

BEFORE THE DEPARTMENT OF ADMINISTRATIVE SERVICES, THE DEPARTMENT
OF LAND CONSERVATION AND DEVELOPMENT OF THE STATE OF OREGON

IN THE MATTER OF THE CLAIM)
FOR COMPENSATION UNDER ORS 197.352)
(BALLOT MEASURE 37) OF)
David Reinhart, CLAIMANT)

FINAL ORDER
CLAIM NO. M118391

Claimant: David Reinhart (the Claimant)

Property: Tax lot 200, Township 3S, Range 1W, Section 7, 17015 Southwest Parrett Mountain Road, Washington County (the Property)

Claim: The demand for compensation and any supporting information received from the Claimant by the State of Oregon (the Claim).

Claimant submitted the Claim to the State of Oregon under ORS 197.352. Under OAR 125-145-0010 *et seq.*, the Department of Administrative Services (DAS) referred the Claim to the Department of Land Conservation and Development (DLCD) as the regulating entity. This order is based on the record herein; including the Findings and Conclusions set forth in the Final Staff Report and Recommendation of DLCD (the DLCD Report) attached to and by this reference incorporated into this order.

ORDER

The Claim is approved as to laws administered by DLCD and the Land Conservation and Development Commission (LCDC) for the reasons set forth in the DLCD Report, and subject to the following terms:

1. In lieu of compensation, the State of Oregon will not apply the requirements of the following law to David Reinhart's division of the subject property into nine, approximately five-acre parcels: the applicable provisions of OAR 660-004-0040. This rule will not apply to the Mr. Reinhart's use of the subject property only to the extent necessary to allow him to use the property for the use described in this report, to the extent that use was permitted when he acquired the property on November 13, 1987.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on November 13, 1987. On that date, the property was subject to applicable provisions of Statewide Planning Goal 14 in effect at that time, and Washington County AF-5 zone, which requires a minimum parcel size of at least five acres.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other

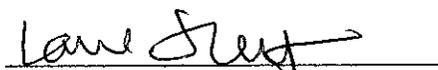
form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 1 above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for him to obtain a decision under ORS 197.352, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

This Order is entered by the Director of the DLCD as a final order of DLCD and the Land Conservation and Development Commission under ORS 197.352, OAR 660-002-0010(8), and OAR 125, division 145, and by the Deputy Administrator for the State Services Division of the DAS as a final order of DAS under ORS 197.352, OAR 125, division 145 and ORS 293.

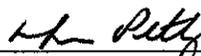
FOR DLCD AND THE LAND CONSERVATION
AND DEVELOPMENT COMMISSION:



Lane Shetterly, Director
DLCD

Dated this 14th day of March, 2006.

FOR the DEPARTMENT OF ADMINISTRATIVE
SERVICES:



Dugan Petty, Deputy Administrator
DAS, State Services Division

Dated this 14th day of March, 2006.

NOTICE OF RIGHT TO APPEAL OR OTHER JUDICIAL RELIEF

You are entitled, or may be entitled, to the following judicial remedies:

1. **Judicial review under ORS 293.316:** Judicial review under ORS 293.316 may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review under ORS 293.316 is pursuant to the provisions of ORS 183.482 to the Court of Appeals.
2. **Judicial review under ORS 183.484:** Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order. A petition for judicial review under ORS 183.484 may be filed in the Circuit Court for Marion County and the Circuit Court in the county in which you reside.
3. **A cause of action under ORS 197.352:** A present owner of the property, or any interest therein, may file a cause of action in the Circuit Court for the county where the property is located, if a land use regulation continues to apply to the subject property more than 180 days after the present owner made a written demand for compensation.

(Copies of the documents that comprise the record are available for review at the Department's office at 635 Capitol Street NE, Suite 150, Salem, Oregon 97301-2540)

FOR INFORMATION ONLY

The Oregon Department of Justice has advised the Department of Land Conservation and Development that "[i]f the current owner of the real property conveys the property before the new use allowed by the public entity is established, then the entitlement to relief will be lost."

**BALLOT MEASURE 37 (ORS 197.352)
CLAIM FOR COMPENSATION**

**OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Final Staff Report and Recommendation**

March 14, 2006

STATE CLAIM NUMBER: M118391

NAME OF CLAIMANT: David Reinhart

MAILING ADDRESS: 1732 Southeast 58th
Portland, Oregon 97214

IDENTIFICATION OF PROPERTY: Township 3S, Range 1W, Section 7
Tax lot 200
17015 Southwest Parrett Mountain Road
Washington County

DATE RECEIVED BY DAS: May 6, 2005

180-DAY DEADLINE: March 21, 2006¹

I. CLAIM

The claimant, David Reinhart, seeks compensation in the amount of \$1,755,000 for a reduction in fair market value of property as a result of certain land use regulations that are alleged to restrict the use of certain private real property. The claimant desires compensation or the right to divide his 45.69-acre property into nine parcels for residential use. The property is located at 17015 Southwest Parrett Mountain Road, east of Labrousse Road, in Washington County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that this claim is valid. Department staff recommends, in lieu of compensation, that the requirements of the following laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply the following law to the claimants' division of the subject property into nine parcels: the applicable provisions of OAR 660-004-0040. This rule will not apply to the claimant's use of the subject property only to the extent necessary to allow him to use the property for the use

¹ This date reflects 180 days from the date the claim was submitted as extended by the 139 days enforcement of Measure 37 was suspended during the pendency of the appeal of Macpherson v. Dep't of Admin. Servs., 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006).

described in this report, to the extent that use was permitted at the time he acquired the property on November 13, 1987. (See the complete recommendation in Section VI of this report.)

III. COMMENTS RECEIVED

On May 26, 2005, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to owners of surrounding properties. In response to the 10-day notice², DAS received three comment letters.

One of the comment letters does not address whether the claim meets the criteria for relief (compensation or waiver) under ORS 197.352. Comments concerning the effects a use of the property may have on surrounding areas generally are not something that the department is able to consider in determining whether to waive a state law. If funds do become available to pay compensation, then such effects may become relevant in determining which claims to pay compensation for instead of waiving a state law.

Two of the comment letters are relevant to whether a state law restricts the claimant's use of the property and whether the restriction of the claimant's use of the property reduces the fair market value of the property. The comments have been considered by the department in preparing this report. (See comment letters in the department's claim file.)

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5), requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of the Measure (December 2, 2004), within two years of that effective date or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of the Measure (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on May 6, 2005, for processing under OAR 125 division 145. The claim identifies OAR 660-004-0040 as the basis for the claim. Only laws that were enacted prior to December 2, 2004, the effective date of Measure 37, are the basis for this claim. (See citations of statutory and administrative rule history of the Oregon Revised Statutes and Oregon Administrative Rules.)

² The 10-day notice period was suspended for 139 days during the pendency of the *Macpherson v. Dep't of Admin. Servs.*, 340 Or ___, 2006 Ore. LEXIS 104 (February 21, 2006), which suspended all Measure 37 deadlines.

Conclusions

The claim has been submitted within two years of December 2, 2004; the effective date of Measure 37, based on land use regulation adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation of relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

According to the claim, David Reinhart, acquired the subject property from his grandfather, Neil Dickenson, on November 13, 1987 by a Bargain and Sales Deed (Washington County Deed Records 87057331).³

A preliminary title report, dated March 30, 2005, and ownership information from Washington County indicate that David Reinhart is the current owner of the subject property.

Conclusions

The claimant, David Reinhart, is an “owner” of the subject property as that term is defined in ORS 197.352(11). Mr. Reinhart acquired an interest in the property on November 13, 1987.

2. The Laws that are the Basis for the Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimant’s use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimant or a family member acquired the property.

³ Linda Reinhart, the claimant’s sister, stated to DLCD staff on October 3, 2005, that she and her brother David Reinhart acquired the subject property, along with her adjacent property, from her grandfather in 1987, who acquired the property “sometime in the fifties.” However, there is no information in the claim to verify the date the family acquired the property. Therefore, this claim cannot be evaluated on the basis of family ownership. However, this does not affect the disposition of this claim because there was no administrative rule provision that is the subject of this claim in effect in either the 1950s or in 1987.

Findings of Fact

The claim states that the claimant “requests an Exemption from OAR 660-004-0040(8)(e) to allow for the development of the site with five (5) acre parcels, as allowed by the AF-5 zoning and the relevant Washington County Development Code Section 302.”

The property is currently zoned Agriculture and Forestry (AF-5) District, which is a rural residential designation under the Washington County Comprehensive Plan. The AF-5 zone requires a minimum of five acres for the creation of new lots or parcels (Washington County Community Development Code, Section 384-6.1). The subject property contains 45.69 acres and could possibly be divided in nine approximately five-acre parcels under the AF-5 zone.

When the claimant acquired the subject property in 1987, it was zoned AF-5, which established a five-acre minimum parcel size for the creation of new lots or parcels. This zoning was acknowledged by the Commission for compliance with the statewide planning goals under the standards for state approval of local comprehensive plans and land use regulations pursuant to ORS 197.250 and 197.251.

Statewide Planning Goal 14 (Urbanization) became effective on January 25, 1975, and required local comprehensive plans to provide for an orderly and efficient transition from rural to urban land use. The courts have found that Goal 14 generally prohibits residential development at urban densities on rural lands. Rural lands are lands outside of an urban growth boundary (UGB). As interpreted by the courts and the Commission, Goal 14 generally prohibits residential development outside of an urban growth boundary where lot or parcel sizes are less than 2 acres. (See, e.g. *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986); *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).) As a result of the 1986 *Curry County Oregon* Supreme Court decision, the Commission amended Statewide Planning Goal 14 (Urbanization) and adopted OAR 660-004-0040, establishing rules for rural residential development outside urban growth boundaries, which became effective on October 4, 2000. The rule provides among other things that after October 4, 2000, any lot or parcel to be divided that is less than one mile from the urban growth boundary for the Portland metropolitan area and is in a Rural Residential area must have a minimum lot size of 20 acres (OAR 660-004-0040(8)(e)).⁴

The subject property is located within one mile of the urban growth boundary for the Portland metropolitan area and is subject to the 20-acre minimum lot size standard under OAR 660-004-0040(8)(e), applicable to rural residential areas located within one mile of the urban growth boundary.⁵ The subject 45.69-acre property can be further divided into only two parcels under the 20-acre minimum lot size standard of OAR 660-004-0040(8)(e).

⁴ The Portland metropolitan service area does not have an urban reserve area acknowledged to comply with OAR 660, division 21. Therefore, the provisions under OAR 660-004-0040 (d) exempting lots or parcels from the 20-acre standard do not apply.

⁵ In 2002, the Metro UGB was expanded approximately one-quarter mile south from its previous location to Brookman Road. That action results in the subject property being located less than one mile from the Metro UGB. (Source: Metro UGB Map, December 2002; Washington County Internet Map; and Assessor Maps 3S 1W 6 and 3S 1W 7).

Conclusions

The minimum lot size requirement for rural residential lots or parcels established by OAR 660-004-0040 was enacted after the claimant acquired the subject property in 1987, and does not allow the division of the property into five-acre parcels, thereby restricting the use of the property relative to the uses allowed when the property was acquired by the claimant in 1987. When the claimant acquired the subject property in 1987, the county's acknowledged AF-5 zoning applied to the property. In 2002, when Metro expanded the UGB south from its previous location, the minimum lot size requirements for the subject property changed to a 20-acre requirement under OAR 660-040-0040(8)(e). It appears that the claimant would have been permitted to divide the subject 45.69 acres into nine approximately five-acre parcels in 1987, when he acquired the property.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. There may be other laws that currently apply to the claimant's use of the property, and that may continue to apply to the claimant's use of the property, that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When the claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that any laws described in Section V.(2) of this report must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of \$1,755,000 as the reduction in the property's fair market value due to current regulations. This amount is based on the claimant being able to create nine approximately five-acre parcels compared to being able to divide the subject 45.69 acres into four 10-acre parcels.⁶ No appraisal was provided to substantiate the reduction in the fair market value.

Conclusions

As explained in Section V.(1) of this report, the current owner is David Reinhart, who acquired the property on November 13, 1987. Under ORS 197.352, Mr. Reinhart is due compensation for land use regulations that restrict the use of the subject property in a manner that reduces its fair market value. Based on the findings and conclusions in Section V.(2) of the report, provisions of OAR 660-004-0040 adopted since 1987, prevent the property from being divided into parcels

⁶ It is not clear why the claimant used a 10-acre standard to determine reduction in the property's fair market value when the current standard is 20-acres.

smaller than 20 acres. The claimant states that the reduction due to the inability to divide the property is \$1,755,000.

Without an appraisal or other documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of laws enforced by the Commission or the department.

4. Exemptions under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The land use regulations that are the subject of this claim are Goal 14 and OAR 660-004-0040, which set forth the requirements for the creation of new lots or parcels in rural residential areas. Goal 14 was in effect when the claimant acquired the property. As a result, it is exempt under ORS 197.352(3)(E), which exempts laws in effect when the claimant acquired the property. The provisions of OAR 660-004-0040 took effect in 2000 and the 20-acre minimum lot size provision applied to the subject property in 2002 when Metro expanded the UGB to the south. Both of those dates are after the claimant acquired the property and these provisions are not exempt under ORS 197.352(3)(E).

Conclusions

Without a specific development proposal for the property, it is not possible for the department to determine what laws may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It does appear that the general goal and rule restrictions on residential development apply to the claimant's use of the property, and for the most part, these laws are not exempt under ORS 197.352(3)(E). Provisions of Goal 14 in effect when the claimant acquired the property in 1987 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimant acquired the property are also exempt under ORS 197.352(3)(E), and will continue to apply to the claimant's use of the property under specified circumstances. There may be other laws that continue to apply to the claimant's use of the property that have not been identified in the claim. In some cases, it will not be possible to know what laws apply to a use of property until there is a specific proposal for that use. When a claimant seeks a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. And, in some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the property based on the uses that the claimant has identified. Similarly, this

report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable given the information provided to the department in the claim. The claimant should be aware that the less information he has provided to the department in his claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to his use of the property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or department has enforced a law that restricts the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law to allow the present owner to carry out a use of the property allowed at the time the present owner acquired the property. The Commission has by rule directed that if the department determines a claim is valid, the director must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the record before the department, laws enforced by the Commission or the department restricts the claimant's ability to divide the property into nine parcels for residential development. The claim asserts that laws enforced by the Commission or the department reduce the fair market value of the subject property by \$1,755,000. Without an appraisal, or other documentation, it is not possible to substantiate the specific dollar amount the claimant demands for compensation. Nevertheless, based on the submitted information, the department determines that it is more likely than not that there has been some reduction in the fair market value of the subject property as a result of land use regulations.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow David Reinhart to use the subject property for a use permitted at the time he acquired the property on November 13, 1987.

Conclusion

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation, the State of Oregon will not apply the requirements of the following law to David Reinhart's division of the subject property into nine, approximately five-acre parcels: the applicable provisions of OAR 660-004-0040. This rule will not apply to the Mr. Reinhart's use of the subject property only to the extent necessary to allow him to use the property for the use described in this report, to the extent that use was permitted when he acquired the property on November 13, 1987.
2. The action by the State of Oregon provides the state's authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on

November 13, 1987. On that date, the property was subject to applicable provisions of Statewide Planning Goal 14 in effect at that time, and Washington County AF-5 zone, which requires a minimum parcel size of at least five acres.

3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the property may not be used without a permit, license, or other form of authorization or consent, the order will not authorize the use of the property unless the claimant first obtains that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a permit as defined in ORS 215.402 or ORS 227.160, other permits or authorizations from local, state or federal agencies, and restrictions on the use of the property imposed by private parties.

4. Any use of the property by the claimant under the terms of the order will remain subject to the following laws: (a) those laws not specified in Condition 1 above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimant to use the property, it may be necessary for him to obtain a decision under ORS 197.352, from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimant from the necessity of obtaining a decision under ORS 197.352, from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the property by the claimant.

VII. COMMENTS ON THE DRAFT STAFF REPORT

The department issued its draft staff report on this claim on October 11, 2005. OAR 125-145-0100(3), provided an opportunity for the claimant or the claimant's authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Comments received have been taken into account by the department in the issuance of this final report.